88-768

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

VINCENT FRANCO,
Petitioner,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's due process rights were violated when Petitioner was terminated from federal employment for his alleged failure to perform where his immediate supervisor also acted as both the proposing and deciding officials.

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OPINIONS BELOW

The opinion of the court of appeals (Appendix, infra, pp. App. 1-10) is not officially reported. All of the decisions of the Merit Systems Protection Board are also not reported (Appendix, initial decision of the Board, infra, pp. App. 11-App.22, remand decision of the Board, infra, App. 23 - 33, final decision of the Board, infra, App. 34 - App. 43).

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals for the Federal Circuit was entered as a judgment on June 2, 1988. No petition for rehearing was filed. Jurisdiction of this Court to review this case on a petition for certiorari rests upon 28 U.S.C. sec. 1254 (1) (1982). The appeal seeks direct

application of the Constitution of the United States to this situation.

CONSTITUTIONAL PROVISION

No person shall ... be deprived of life, liberty, or property, without due process of law ....

U.S. Constitution, amend. V.

STATEMENT OF THE CASE

Petitioner Vincent W. Franco was employed by Respondent Department of Health and Human Services as a GS-11 Tecnnical Publications Writer in the Office of Health Research Reports of the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases (hereafter "NIADDK"). His tenure with the federal government afforded him career status, which he held at all times

relevant to this matter. In one aspect of his position, Petitioner had responsibility for reviewing available biomedical literature, selecting articles concerning significant NIADDK-supported research and then preparing a summary "for the purpose of translating technical information into lay-level language", as set forth in the performance standards by which he was evaluated. (Critical Element No. 1).

In April, 1985, following her determination that Petitioner's performance of the responsibilities above was not satisfactory, Petitioner's immediate supervisor, Elizabeth H. Singer, placed him on a written performance improvement plan. Seven work products were presented to Ms. Singer for her review during that period. Each work

product involved oral and written interaction between Ms. Singer and Petitioner, where she noted her criticisms and he presented explanations and rebuttals. Ms. Singer, as Petitioner's immediate supervisor, determined that all seven research summaries submitted by Petitioner were unacceptable under the performance standard for Critical Element No. 1.

In October, 1985, acting in the separate role of Proposing Official, Ms. Singer proposed to remove Petitioner from the federal government due to his alleged performance failures on the seven work products. Thereafter, Petitioner was granted the "opportunity" to present orally and in writing, if he chose, any response to the proposal to terminate him. Petitioner did both, in conjunction

with his representative, but on November 18, 1985, acting in her third separate role, Ms. Singer, as Deciding Official issued a decision for the Agency in which she concluded, as she had previously, that Petitioner should be removed for performance failures.

In addition to defending his performance, Petitioner raised to Ms. Singer the propriety of her multiple roles in his termination. Although his claim was not couched in "due process" terms, Petitioner identified clearly the likelihood of the lack of impartiality inherant in Ms. Singer's multiple roles. Ms. Singer herself determined that it was appropriate for her to continue in the process.

A timely appeal was taken by Petitioner to the Merit Systems

Protection Board, which, after a hearing, affirmed Ms. Singer's decision to terminate on the grounds that, although Ms. Singer may have personally disliked Petitioner Franco, the evidence had failed to show that any bias has actually infected Ms. Singer's decision to terminate him. The Board also determined that no procedural bias occurred due to Ms. Singer's roles as both Proposing and Deciding Officials.

In the following Petition for Review by the Board and the subsequent remand hearing before the original ALJ, the due process issue was raised as a constitutional failure of the procedure. Ruling that it was not raised as such at the hearing level, the Board did not address it, although the matter was remanded on other grounds. At the second

hearing, the ALJ refused to address the constitutional claim because the Board had not addressed it. Following the second hearing, the MSPB again affirmed the termination of Petitioner.

Jurisdiction for appeal of the decision of the Merit Systems Protection Board is conferred by statute to the United States Court of Appeals for the Federal Circuit, pursuant to 5 U.S.C. sec. 7703 (Supp.IV, 1986). The only issue on appeal to that court was the claim that a decision to terminate a federal employee which is made by an immediate supervisor who also proposed the termination was a denial of constitutional due process pursuant to the Fifth Amendment. In a two to one decision, the termination was affirmed. Senior Circuit Judge Baldwin dissented,

writing that in this case, due process had been denied to Petitioner.

Petitioner Franco seeks this Court's intervention to protect his constitutional due process rights.

ARGUMENT

Petitioner contends that the majority decision of the lower court has decided an important question of federal law which should be settled by a decision of this Court, or is in conflict with those decisions of this Court interpreting the Due Process Clause of the Fifth Amendment of the United States Constitution. Specifically, prior decisions of this Court, as discussed below, define the fundamental fairness imposed on a federal determination to deprive one of property. Because

Petitioner contends that he was not accorded such fairness, this Court should intervene.

It is well settled that career status civil servants with an expectation of continued employment, such as Petitioner Franco, have a constitutionally protected property interest. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985); Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The position held by Petitioner Franco was subject to the safeguards of the Civil Service Reform Act of 1978, 5 U.S.C. secs. 1101 et seq. (1982), and thus he could not be removed except for reasons which would promote the efficiency of the federal service.

Since the Constitution dictates that no deprivation of such property will

occur without "due process of law", Due Process Clause, Fifth Amendment, the detmination that Petitoner had a property interest in his federal job raises the next inquiry: what process is due? Loudermill, supra.

Since at least Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950), it has been asserted by this Court that notice and an "opportunity for hearing appropriate to the nature of the case" is "an essential principle of due process..." Loudermill, supra, 470 U.S. at 557. The opportunity to be heard, to be meaningful, should occur before property is taken. Boddie v. Connecticut, 401 U.S. 371, 379 (1971); Armstrong v. Manzo, 380 U.S. 545, 552 (1965). "This Court consistently has held that some form of hearing is required before an

individual is finally deprived of a property interest." (citations omitted) Mathews v. Eldridge, 424 U.S. 319, 333 (1975). Such hearing need not amount to full adjudication and, in Arnett v. Kennedy, supra, the Court held valid against a due process challenge procedures followed in terminating a federal employee which included opportunities to respond in writing and appear personally before the decision-maker.

But the decision-maker must be impartial. Withrow, supra; Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (where it was held that "an impartial decision maker is essential"). Here, the MSPB decision wrongly weighed that factor when, in response to unrefuted testimony that dislike of Petitioner existed in the

decision-maker, the Board determined that such was acceptable since Petitioner Franco "has not established that any such bias or malice on the part of Ms. Singer had any bearing on the decision to remove him." App. 20 . Petitioner contends that when bias or malice rears its head, the risk is intolerably high that the decision if not fundamentally fair. Although the issue is not that bias is present, but the situation before the lower court was exacerbated by the unrefuted allegations of bias or malice. As discussed below, compliance with the statute does not make the risk disappear.

Another separate factor was given consideration by the dissent below. Ms. Singer, as Deciding Official, did not merely review facts she had discovered through investigation, (compare, Hanley

v. General Services Administration, 829 F.2d 23 (Fed. Cir. 1987) and DeSarno v. Department of Commerce, 762 F.2d 657 (Fed. Cir. 1985) where two terminations were upheld although challenged because the decision makers were also proposing officials, but in both cases that decision maker was three supervisory levels above the employee terminated). Another vital distinction is that both of those cases involved conduct determinations and here the issue is alleged failure to perform a subjective task. Ms. Singer did not perform an investigation of the facts here, she created them, when, in her role as immediate supervisor, she made the initial determination that the performance of Petitioner was unsatisfactory. Those facts were

subjective, as shown by the testimony contrary to Ms. Singer's at the MSPB by two qualified experts who found Petitioner's work product to be satisfactory. The combination of subjectivity in the creation of the facts, the reticence to change a public decision and the apparent person dislike of the Petitioner generates a risk of bias or prejudgment that is intolerably high, thus violating the Due Process Clause.

Respondent argued below that it complied with the applicable regulations and statute in the procedure it followed in terminating Petitioner. The majority opinion relied on that compliance to find that due process was accorded to Petitioner. The lower court erred in ending its review of the procedures once

compliance with the statute was seen.

The Court, however, has now clearly stated that the inquiry as to the constitutional muster of procedures employed to deprive one of property no longer ends with mere compliance with statutory or regulatory procedures. Loudermill, supra, 470 U.S. at 542. Arnett v. Kennedy, 416 U.S. 134, 185 (1975) (concurrence of Justice White).

The Agency Respondent did comply with the appropriate statute and with the regulations it had promulgated for compliance with that statute. The inquiry cannot end there, however, as the particular method used to comply with the regulations here allowed a procedure for termination which did not accord due process. Here, the official who made the determination to deprive Petitioner of

property did so in a context which unduly created "a risk of bias or prejudgment ... (that was) intolerably high ..." Withrow v. Larkin, 421 U.S. 35, 57 (1975). Further, that official was "so psychologically wedded..." to her earlier decisions that she inevitably attempted to "avoid the appearance of having erred or changed positions." Id.

Another method of review for this situation was clarified by the child custody decision of Armstrong v. Manzo, 380 U.S. 545 (1965), where the Court held that due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner". The critical question there presented was the impact to be afforded a post-deprivation hearing. Petitioner Armstrong was the natural father of a child who was adopted

without notice to him. The hearing he was granted to challenge the ruling that allowed his child to be adopted without his involvment applied different burdens on him than he would have faced in pre-ruling proceedings. The due process requirement of an "opportunity to be heard", Grannis v. Ordean 234 U.S. 385, 394 (1914), has substance only if the opportunity has meaning. Here, the supervisor of Petitioner Franco was the only person to receive Petitioner's oral and written challenges to the termination. In her everyday duty to supervise Petitioner and perhaps even more so during the Performance Improvement Period, Ms. Singer heard Petitioner's explanations and rebuttals to her complaints of his performance. Thereafter, Ms. Singer proposed his

termination. We argue that the "opportunity" then granted to Petitioner to present to Ms. Singer again his explanations and rebuttals of her evaluations of his performance was not meaningful.

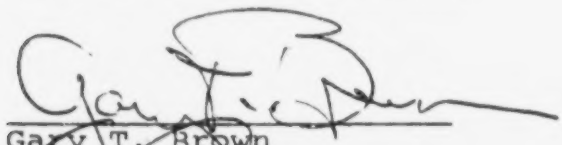
The opportunity to present "his side of the story", Loudermill, supra 470 U.S. at 557, to the Merit Systems Protection Board does not satisfy Petitioner's due process needs for the same reasons set forth in Armstrong, supra -- the increased burdens on Petitioner in the post-deprivation hearing do not provide the opportunity "at a meaningful time and in a meaningful manner".

Finally, the majority's decision below relies on the safeguards provided by statute.

CONCLUSION

For the foregoing reasons, Petitioner Franco respectfully requests this Court to grant his Petition for Certiorari.

Respectfully Submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NO. 87-3567

VINCENT W. FRANCO,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

DECIDED JUNE 2, 1988

Before NIES, Circuit Judge, BALDWIN, Senior Circuit Judge, and NEWMAN, Circuit Judge.

NEWMAN, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board, Docket No. DC04328610097-1, affirming the removal of Vincent W. Franco for unacceptable performance under the procedures of Chapter 43, is affirmed.

OPINION

Mr. Franco raises a constitutional challenge to the procedures followed, arguing that when the proposing official and the deciding official are the same, any bias against the employee by the proposing official will deprive the employee of the safeguards intended ;by the statutory provision of review by a deciding official at the agency level, 5 U.S.C. sec. 4303 (1982).

It is not disputed that the procedures followed did conform to Section 4303. This court has previously established that the statute does not prohibit the saame person from serving as proposing and deciding official, even where that person also has a role in the supervisory heirarchy. See, e.g., Hanley v. General Services Administration, 829

F. 2d 23, 25 (Fed. Cir. 1987); DeSarno v. Department of Commerce), 761 F.2d 657, 660 (Fed. Cir. 1985).

The statute, 5 U.S.C. sec. 4303 (b)(1)(D)(ii) (1982), also requires that a person in higher supervisory status exercise considered judgment in concurring in the removal. It has not been demonstrated that Dr. Renault did not do so. We conclude that the statute is not flawed in terms of due process of law. See Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547-48 (1985) (a per-termination opportunity to respond plus a post-terminaiton hearing under state statute does not violate due process).

In the ensuing proceedings before the Board, witnesses appeared on behalf of Mr. Franco as well as the agency; we

conclude that substantial evidence supports the Board's decision, on the somewhat conflicting evidence before it. See 5 U.S.C. sec. 7703(c) (1982); Hayes v. Dept. of the Navy, 727 F.2d 1535, 1537 (Fed. Cir. 1984).

BALDWIN, Senior Circuit Judge, dissenting.

I dissent from the majority's conclusion that the procedures followed in this case did not violate petitioner's due process rights.

Respondent's main defense was that petitioner's constitutional claims are not properly before the court, and therefore the court cannot consider them. Respondent relies primarily on footnote 3 of the board's March 12, 1987 Opinion and

Order which stated that the constitutional issue was raised for the first time on petition for review (and therefore refused consideration of the issue). The majority opinion does not address whether the constitutional issue is properly before this court. The opinion appears to accept that the issue is properly before us, however, because it decides the merits against petitioner. Ante at 2.

To the extent the majority opinion implies this, I agree. I would hold, on this issue, that petitioner's questioning of the propriety of his supervisor's dual capacity in his removal action from the early stages of that action was sufficient to put the government on notice that constitutional problems existed. See, e.g., Initial Decision of

April 15, 1986 at 9 (clearly stating that petitioner raised "claims that the agency commited procedural error because Ms. Singer served as both proposing and deciding official"). It is not necessary that petitioner frame his issue in constitutional terms at the initial stages. Rather, perservation of petitioner's rights occurred when respondent was put on notice of petitioner's position. See Conley v. Gibson, 355 U.S. 41, 48 (1957) (The "purpose of pleading is to facilitate a proper decision on the merits"). Alexander v. The Unification Church of America, 634 F.2d 673, 678 (2d Cir. 1980). See also 5 C. Wright & A. Miller, Federal Practice and Procedure, sec. 1286 (1969).

The facts in Hanley v. General

Services Administration, 829 F.2d 23 (Fed. Cir. 1987) and DeSarno v. Department of Commerce, 761 F.2d 657 (Fed.Cir. 1985) are sufficiently distinct from those presented here to require an exception to the general rule that it is "not a violation of due process when the proposing and deciding roles are performed by the same person" at the pretermination stage. 761 F.2d at 660. In neither of those cases was the person acting in this dual capacity the employee's immediate supervisor. In addition, both DeSarno and Hanley dealt with removals based on misconduct, whereas Mr. Franco's removal was performance-based. In DeSarno the removal was based on submission of false travel vouchers, while the petitioner in Hanley was removed for sexually harassing

subordinate female employees and improperly authorizing use of a government vehicle, equipment and staff.

This situation is not one in which the person acting in the dual capacity is above the original fray. In DeSarno the court said that "the law does not presume that a supervisor who proposes to remove an employee is incapable of changing his or her mind upon hearing the employee's side of the case." 761 F.2d at 660. As a general rule, this proposition is valid, and it may even be valid in performance-based removal actions where the proposing and deciding official are not the immediate supervisor. However, where, as here, the person wearing two hats is the same person who has evaluated the employee's performance, and upon whose evaluation the ultimate decision

must rest, the assumption that the supervisor may change his or her mind "upon hearing the employee's side of the case" falls desperately short. Presumably, the supervisor has been communicating with the employee about his perceived deficiencies for some time prior to the proposed removal, including during the performance improvement period (PIP). If this is the case, then the immediate supervisor already knows the employee's side of the case.

In this case, petitioner and his supervisor had worked together for several years. The supervisor had evaluated petitioner for an extended period and found his performance unacceptable. It is unreasonable to expect that anything that petitioner could say to his supervisor during an

informal hearing could cause her to change her mind about these evaluations. I would recognize, as a caveat to the general rule laid down in Hanley and DeSarno, that in a performance-based removal action, where the proposing and deciding official are the same person, and that person is also the employee's immediate supervisor who is charged with the daily evaluation of the employee, it is a violation of fundamental principles of fairness and due process to have that person act in that dual capacity. Thus, I would hold the peculiar circumstances of this performance-based removal action violative of petitioner's due process rights.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

NO. DC04328610097

VINCENT W. FRANCO,
appellant

V.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
agency.

DECIDED APRIL 15, 1986

JENKINS, Presiding Official

INTRODUCTION

By petition filed December 12, 1985, appellant appealed from the action of the agency removing him for unacceptable performance, effective November 22, 1985. The Board has jurisdiction over appellant

and the action he has appealed. 1/ 5 U.S.C. Sec.s 7701(a), 4303(3).

For the following reasons the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

Appellant was a Technical Publications Writer, GS-11, in the Office of Health Research Reports (OHRR), National Institute of Arthritis, Diabetes, and Digestive and Kidney Disease (NIADDKD), National Institutes of Health. On April 1, 1985, appellant's supervisor, Elizabeth H. Singer, Director of OHRR, completed her appraisal of appellant for the 1984 calendar year and rated his performance unacceptable because of his

1/ At the hearing appellant withdrew his claim of age discrimination.

failure to meet critical element 1 of his performance plan. (Ag. File, Tab 3). Subsequently, on April 17, 1985, Ms. Singer advised appellant in a written Performance Improvement Plan (PIP) that he was being given 90 days to demonstrate acceptable performance and that failure to raise his performance to that level might result in his removal or a reduction in grade. (Ag. File, Tab 11). Critical element 1, which was identical to critical element 1 of appellant's 1984 performance plan, provided that appellant:

> Prepare summaries of research articles published in the biomedical literature about the results of NIADDK-supported research for the purpose of traslating technical information into lay-level language.

On July 15, 1985, Ms. Singer informed appellant that his performance improvement period was extended 30 days and would end on August 16, 1985. (Ag. File, Tab-25). At the end of this period Ms. Singer determined that all seven of the research summaries submitted by appellant were unacceptable under the performance standards for critical element 1. On October 4, 1985, she therefore proposed to remove appellant and on November 18, 1985, issued a final decision for the agency in which she concluded that removal was warranted. (Ag. File, Tabs 39, 45). 2/

2/ The agency motion opposing appellant's request for leave to file his closing argument out of time is denied. No actual prejudice is demonstrated by the agency.

Chapter 43 Requirements

As the agency's action was taken under Chapter 43 of Title 5, U.S.C., consideration must first be given to the substantive rights granted appellant by a Chapter 43 performance appraisal system. In this regard, unrebutted documentary evidence from the Office of Personnel Management (OPM) establishes that the agency's performance appraisal system was approved by OPM in March 1981, and was therefore in place during all times pertinent to this action. (Ag. File, Tab 2). 5 U.S.C. Sec. 4304(b)(1); Griffin v. Department of the Army, 23 M.S.P.R. 657 (1984). The 1985 performance plan for appellant and the testimony of Ms. Singer also demonstrate that appellant's elements and standards were communicated to him before the beginning of the

appraisal period, the 120-day opportunity period, which forms the basis of the removal action. 5 U.S.C. Sec. 4302(b)(2); Weirauch v. Department of the Army, No. 85-2290 (Fed. Cir. Jan. 30, 1986), Cross v. Department of the Air Force, 25 M.S.P.R. 353, 357 (1984). Furthermore, with the exception of a change of one word in one of the performance standards for critical element 1, the 1985 performance plan of appellant was identical to the 1984 plan provided to him in February 1984.

It is the contention of appellant, however, that his performance standard for critical element 1 was vague and susceptible to manipulation by Ms. Singer and that it therefore violated the objectivity requirement of 5 U.S.C. Sec. 4302(b)(1). He also claims that he was

not informed of the level of performance he would have to reach to be retained and that he consequently was not provided an adequate opportunity to demonstrate acceptable performance before action to remove him was initiated. 5 U.S.C. Sec 4302(b)(6).

In Siegelman v. Department of Housing and Urban Development, 13 M.S.P.R. 27 (1983), the Board held that an employee is entitled to challenge his performance standards as failing to meet the requirements of 5 U.S.C. Sec. 4302(b)(1). It also concluded that its scope of review was "limited to determining whether the agency abused its discretion in establishing the standards at issue so as to cause harm to the employee to whom the standards were applied." In Wilson v. Department of

Health and Human Services, 770 F. 2d 1048, 1052 (Fed. Cir. 1985) the Court agreed with the Board's Siegelman formulation, finding "that under the statute's objectivity requirement performance standards must be reasonable, sufficient in the circumstances to permit accurate measurements of the employee's performance, and adequate to inform the employees of what is necessary to achieve a satisfactory or acceptable rating."

Appellant's performance standards for critical element 1 describe performance at three different levels. The standard is "Fully met" if reports and summaries are complete, accurate, and comprehensible and if they contain "clear and concise language understandable to lay audience." If this material "requires little or no editing" and is "always

technically correct," performance has "Exceeded" the standard. On the other hand, performance is at the "Partially Met" level if the employee, "at times, submits summaries that are unclear, poorly organized, or that use of highly technical language unsuitable to meet the needs of a lay audience." 3/

Appellant claims that because of the term "at times," the standard is so vague that it fails to meet the requirement of 5 U.S.C. Sec 4302(b)(1). In Wilson, supra, the court did find deficient a

3/ In the 1984 performance plan the word "occasionally" rather than "at times" was included in the "Partially Met" standard. No explanation for the change has been presented nor is there any evidence that any difference in meaning was intended or enforced.

performance standard that required a supervisor's direction of her subordinates' work to be "occasionally effective." That standard, which also defined performance at the minimally acceptable level, referred to work that was "effective" and thus satisfactory, and therefore required the agency in that case to prove unacceptable performance by showing that the employee was never effective. Id., at 1053. In appellant's standard, however, "at times" precedes a description of unsatisfactory work. Assigning to "at times" the meaning the court in Wilson gave to "occasionally," the standard is only partially met if the quality of the work is unsatisfactory less than the majority of the time. It logically follows, therefore, that if a majority of the summaries submitted by

appellant were not of acceptable quality, his performance would be below the "partially met" level. The performance standard for critical element 1, I conclude, adequately advised appellant of the amount of acceptable work he had to perform. Section 4302-(b)(1) does not compel the use of precise quantitative or numerical standards, id. at 1052, and in this case appellant has not alleged and the record does not suggest that such a standard was necessary.

Appellant also contends that his standard was defective because of the vagueness of the term "lay audience." Ms. Singer had on several occasions informed appellant that she meant an educated lay audience. (Ag. File, Tab 5). She testified that the audience for the summaries prepared by appellant included

NIH employees, patients and their families, the public, and other science writers. She explained further that this "lay audience" would have a tenth to twelth grade reading level.

While these efforts to define "lay audience" are not, I conclude, alone sufficient to inform appellant of what was expected of him, the many examples put him on notice of the meaning of the standard and Ms. Singer's requirements. In April and June 1984, appellant was advised that his summaries were too technical. (Ag. File, Tabs 5, 6). During a progress review in October 1984 Ms. Singer again told appellant that his articles were unsuitable for a lay audience and cited specific examples. (Ag. File, Tab 7). In an April 1, 1985, meeting with appellant concerning his

appraisal for 1984, and in the PIP memorandum of April 17, 1985, Ms. Singer provided detailed comments on those aspects of appellant's summaries that she found unsuitable for a lay audience. (Ag. File, Tab 12). Finally during the improvement period as each summary was returned to appellant, examples of overly technical language were noted. With these numerous oral and written instructions, the term "lay audience" was given content and meaning that met the objectivity requirement of section 4302(b)(1). Baker v. Defense Logistics Agency, 25 M.S.P.R. 614 (1985); Shuman v. Department of the Treasury, 23 M.S.P.R. 620 (1984). For this reason and because of the nature of the position held by appellant, the necessary presence of some subjective judgment on the part of Ms. Singer does

not invalidate the standard. Faust v. Smithsonian Institution, 29 M.S.P.R. 496 (1985); Stubblefield v. Department of Commerce, 28 M.S.P.R. 572 (1985); Wilson, supra.

Appellant maintains that the PIP incorrectly advised him that he had to raise his performance to the fully acceptable level and that he therefore was not provided an adequate opportunity period. To be retained, and employee need meet only the minimum performance standards for his critical elements. 5 C.F.R. Sec. 432.202; Wilson v. Interstate Commerce Commission, 28

M.S.P.R. 198 (1985). 4/ Ms. Singer's April 17, 1985, PIP memorandum was therefore inaccurate in announcing that appellant's performance had to become fully successful by the end of the opportunity period. Nevertheless, the evidence shows that appellant was on notice of the level of performance he would have to reach to be retained.

Appellant's written standards did describe performance at a minimally acceptable level, and as discussed above, did put him on notice that if he "at times" submitted unacceptable work he would still partially meet critical element 1. The PIP memorandum emphasizes

4/ The regulatory provision cited by the agency, 5 C.F.R. Sec. 430.405(j), is applicable only to supervisors and management officials in grades GS-13 to GS-15, and is therefore irrelevant to this case.

those aspects of appellant's work that would have to be improved if his summaries were to be of acceptable quality. It says nothing one way or another about the number of summaries that would have to meet the quality requirements. The requirement of the "partially met" standard was therefore not changed for the improvement period and remained in effect. In this regard it is noted that the proposal notice cited appellant's failure to meet his standard, not his failure to perform at a fully acceptable level. The opportunity period provided by the agency fully satisfied appellant's rights under 5 U.S.C. Sec. 4302(b)(6).

Performance During the Improvement Period

Appellant submitted seven summaries during the improvement period. Ms. Singer found all seven to be of unacceptable quality in that they contained highly technical language, were unclear and poorly organized, in some instances extended the conclusion of the author beyond what was stated in the article or interpreted the results of the journal article incorrectly, and were unsuitable for the intended audience. The credible and persuasive testimony of Ms. Singer in support of these charges was consistent in all respects with the notation, comments, and changes that appear on the work products submitted by appellant. (Ag. File, Tabs 13-15; 16 and Ag. Ex. 3; 17, 18, 20, 26; 19, 21, 27, 34; 22, 23,

28; 24, 29, 31, 33, 35, 36; and 32, 37 38). Ms. Singer's view of appellant's work on the first and sixth summary, was also shared by Constance Raab. As Deputy Director of OHRR, Ms. Raab had been involved in the review of these two products.

The testimony of Ms. Singer and Ms. Raab and appellant's drafts and redrafts of the seven summaries support the agency's determination that appellant's work required extensive revision and rewriting. It was the testimony of Ms. Singer that when first submitted by appellant none of his summaries were useable. In this regard appellant claims that Ms. Singer altered his performance standard by demanding that his first draft be of publishable quality. This contention, however, is unsupported by

any evidence. Consistent with the guidance provided in the PIP memorandum (Ag. File, Tab 12, p.5), Ms. Singer testified that an initial draft could reasonably and permissibly require some editing. However, a summary that had to be completely revised and rewritten was not of acceptable quality.

Appellant contends, and so testified, that his work on all seven summaries was acceptable. 5/ He also offered the testimony of an expert witness, Horace Freeland Judson, Professor of Science and Writing at Johns Hopkins University (App.

5/ The writing found in App. Ex. 1, an annual report of NIADDKD, is not similar to the summaries that appellant had to prepare and is therefore of no probative value in evaluating his performance.

Ex. 3). Appellant's evidence is not sufficient, however, to overcome the otherwise reasonable explanations presented by the agency. Professor Judson found the fourth summary of appellant to be "quite polished," and his sixth summary to be "excellent" and "exemplary." On the other five products, however, he acknowledged that they needed some editing, that some changes were necessary, and that one was a bit more technical than wanted. He also testified that appellant was a "stiff" writer, and explained that by that expression he meant appellant was formal and precise. In examining apppellant's second draft on the first summary, he agreed that it was an improvement and an enormous step forward. This draft, the record shows, contained the changes recommended by Ms.

Singer. As Professor Judson conceded that he did not know the editing practices of NIADDKD or what performance level was expected of a GS-11 Technical Writer in OHRR, and as he himself would have revised most of the summaries submitted by appellant during the improvement period, his testimony does not establish that appellant's work was of acceptable quality.

Pursuant to 5 U.S.C. Sec. 7701(c)(1)(A), the agency's action must be supported by substantial evidence. Substantial evidence is defined as "that degree of relevant evidence which a reasonable mind considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true." 5 C.F.R. Section 1201.56(c)(1). Lovshin v. Department of

the Navy, 767 F.2d 826, 844 (Fed. Cir. 1985). The evidence presented by an agency need not be more persuasive than that presented by the appellant. Shuman, supra, at 624. The testimony of Ms. Singer and Ms. Raab and the samples of appellant's work constitute the required substantial evidence. Appellant failed to meet the performance standard for critical element 1 and his performance was therefore "unacceptable." 5 U.S.C. Sec. 4301(3).

Procedural Error - Bias

Appellant claims that the agency committed procedural error because Ms. Singer served as both proposing and deciding official and because Dr. Pierre Renault, the concurring official, failed to give the reasons for his concurrence.

No applicable regulatory or statutory provision proscribing Ms. Singer's action or requiring an explanation from Dr. Renault has been identified, however. Ms. Singer's dual role is authorized by the agency's delegations of authority (Ag. Exs. 6-8), and Dr. Renault's concurrence satisfies the requirement of 5 U.S.C. Sec. 4303(b)(1)(D)(ii). Appellant has failed to establish any error by the agency in its processing of this removal action.

Appellant testified that Ms. Singer disliked him personally, that she resented his medical and biological training, and that she disliked his literary style. Even assuming, however, that some personal dislike existed, appellant has not established that any such bias or malice on the part of Ms.

Singer had any bearing on the decision to remove him. The notice proposing the removal of appellant was not issued until October 1985, nearly 21 months after Ms. Singer first became concerned about the quality of his work. (Testimony of Singer; Ag. File, tabs 5, 6). As action for unacceptable performance can be taken at any time during the performance appraisal cycle, 5 C.F.R. Sec. 432.203(a), the record demonstrates considerable patience and tolerance by Ms. Singer. Ms. Singer, the evidence also shows, granted appellant a lengthy improvement period and then extended it an additional 30 days. These actions as well as the many documented efforts to assist appellant argue persuasively against the presence of personal bias or animosity in Mr. Singer's decision to

remove appellant.

REVIEW RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on May 20, 1986, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and .117 (1985). Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with the Board's regulations. 5 C.F.R. 1201.114-.115. The parties should note that, effective

August 1, 1985, they are required to serve any petition for review and any subsequent pleadings on all other parties. It is not necessary to serve the Regional Office. See 50 Fed. Reg. 28894 (July 17, 1985) and 30801 (July 30, 1985). The petition for review must be filed on or before May 20, 1986 and must set forth objections to the initial decision, supported by reference to applicable laws and regulations, and the record.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for

judicial review must be received by the Court within thirty (30) days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals for
the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

For the Board:

William C. Jenkins
Presiding Official

dd/clm

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NO. DC04328610097

VINCENT W. FRANCO,
Appellant,

V.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,
Agency.

DECIDED MARCH 12, 1987

Before Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Dennis M. Devaney, Member

OPINION AND ORDER

Appellant has filed a petition for review of an initial decision that sustained the agency's action removing him from the position of Technical Publications Writer, GS-11, in the Office of Health Research Reports, National Institute of Arthritis, Diabetes, and Digestive and Kidney Disease (NIADDKD), National Institutes of Health, for alleged

unacceptable performance under the procedures of 5 U.S.C. Chapter 43. For the reasons set forth below, the petition for review is GRANTED under 51 Fed. Reg. 25,158 (1986) (to be codified at 5 C.F.R. Sec 1201.115) 1/ and the initial decision is VACATED with respect to its determination that appellant's performance was shown to be unacceptable and REMANED for further testimony on this issue.

1/ On July 10, 1986, the Board republished its entire rules of practice and procedure in the Federal Register. For ease of reference, citations will be to the Board's regulations at 5 C.F.R. Part 1201. However, parties should refer to 51 Fed. Reg. 25,146-72 (1986) for the text of all references to this part.

BACKGROUND

Appellant was removed from his position effective November 22, 1985, based on his alleged unacceptable performance of one critical element of his position. He filed a timely petition for appeal with the Board's Washington, D.C., Regional Office. After affording the parties a hearing, the administrative judge 2/ issued an initial decision finding: (1) that the agency's performance appraisal system was approved by the Office of Personnel Management; (2) that appellant's performance standards were communicated to him before the beginning

2/ Effective May 8, 1986, the working title for the Board's regional office attorney-examiners has been changed from "presiding official" to "administrative judge".

of the appraisal period; (3) that the performance standard for the critical element at issue was not defectively vague or subjective under 5 U.S.C. Sec. 4302(b)(1) and was properly given content and meaning by the agency; (4) that appellant was on notice of the minimally acceptable level of performance he would have to reach to be retained; (5) that the 120-day performance improvement period afforded appellant provided him a reasonable opportunity in which to demonstrate acceptable performance and that his performance did not improve to an acceptable level; (6) that the agency showed by substantial evidence that appellant's performance of the critical element at issue was unacceptable; (7) that appellant did not show that the agency committed harmful error by

designating his supervisor as both the proposing official and the deciding official, or by the concurring official's failure to give the reasons for his concurrence; and (8) that appellant did not show that the removal action was based on the alleged bias or personal animus of his supervisor.

Appellant has filed a timely petition for review of the initial decision, to which the agency has responded in opposition.

ISSUES

1. Did the agency commit harmful error by designating appellant's supervisor as both the proposing official and the deciding official in the removal action?

2. Did the administrative judge commit prejudicial error by denying certain witnesses requested by appellant?

ANALYSIS

1. The agency did not commit harmful error by designating appellant's supervisor as both the proposing official and the deciding official in the removal action.

Appellant contends that the agency erred by permitting his supervisor, who was allegedly motivated by personal animosity against him, to serve as both the proposing official and the deciding official in the removal action. The Board has stated that an employee's procedural rights in a Chapter 43 proceeding are set forth in 5 U.S.C. Sec. 4303 and 5 C.F.R. Sec. 432.101. See Anderson v. Department of State, 27 M.S.P.R. 344, 348 (1985), aff'd, 790 F.2d 91 (Fed. Cir. 1986); Sandland v. General Services

Administration, 23 M.S.P.R. 583, 590 (1984). The procedures for effecting a removal or demotion action under 5 U.S.C. Chapter 43 require that such action be concurred in by an employee who is in a higher position than the proposing official. 5 U.S.C. Sec. 4303(b)(1)(D)(ii); 5 C.F.R. Sec. 432.101(b). An allegation that an agency violated the notice requirements of Section 4303(b)(1) is subject to a harmfull error analysis. See Coltrane v. Department of the Army, 25 M.S.P.R. 397, 403 (1984); Sandland, 23 M.S.P.R. at 590 n.11. 3/

3/ Appellant contended for the first time on petition for review that the procedure used by the agency to decide his removal violated constitutional due process. The Board will not consider this argument raised for the first time

The administrative judge found that the dual role of appellant's supervisor, Ms. Singer, as both the proposing official and the deciding official was authorized by the agency's delegations of authority. 4/ He also found that the concurrence in Ms. Singer's original decision to remove by Dr. Renault, the acting director of NIADDKD, satisfied the requirement of 5 U.S.C. Sec. 4303(b)(1)(D)(ii). See initial decision at 9.

The record is clear that the concurring

3/ (cont'd) on review since appellant has not shown that it was based on new and material evidence that was not previously available despite the exercise of due diligence. See, e.g., Banks v. Department of the Air Force, 4 M.S.P.R. 268, 271 (1980).

4/ See agency hearing exhibits 6-8.

official, Dr. Renault, was in a higher position than was appellant's supervisor The statute does not require that the proposing and the ceciding officials be different employees. The Board, further, will not place nonstatutory or nonregulatory encumbrances upon the agency decision-making process in a Chapter 43 action. See Andersen, 27 M.S.P.R. at 348. The Board finds that the agency's designation of appellant's supervisor as both the proposing official and the deciding official was not procedurally improper. See Peterson v. Department of Health and Human Services, 25 M.S.P.R. 572, 573-74 (1985) (harmful procedural error did not occur when the employee's demotion under Chapter 43 was proposed by his second-line supervisor and decided by his new second-line

supervisor inasmuch as the demotion decision was concurred in by an agency official in a higher position than the employee's second-line supervisor).

Appellant contends further that even if the agency's decision-making procedure in this case was proper, the reply process and the agency's evaluation of the evidence was tainted because of the bias and personal animosity of his supervisor against him. The administrative judge, however, found that even assuming that some personal dislike existed, appellant did not establish that any bias or dislike by his supervisor had any bearing on her decision to remove him. See initial decision at 10. Appellant has not shown any basis to disturb the administrative judge's fact findings and credibility determinations in this

regard. See Jackson v. Veterans Administration, 768 F.2d 1325, 1331 (Fed. Cir. 1985); Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133-34 (1980), aff'd, 669 F.2d 613 (9th Cir. 1982). There is no general proscription of the appointment of a deciding official who is also the reply official and who is familiar with the facts of the case and has expressed a predisposition contrary to appellant's interests. See Benton v. Department of Labor, 25 M.S.P.R. 430, 436 (1984); Beatty v. Department of Housing and Urban Development, 20 M.S.P.R. 436, 438 (1984). Since the administrative judge found that appellant did not show that his removal was based on his supervisor's bias or personal animus, the Board finds that he has not shown that the agency's choice of his supervisor as

the proposing and deciding official made the risk of unfairness to him "intolerably high". See Beatty, 20 M.S.P.R. at 438.

2. The administrative judge committed prejudicial error by denying certain witnesses requested by appellant.

Dr. Renault

Both appellant and the agency requested the testimony of Dr. Renault, the concuring official, at the hearing. 5/ The administrative judge found that the testimony of Dr. Renault was unnecessary to show that he concurred in the decision to remove, but that his testimony for

5/ See appeal file, tabs 6, 7.

other reasons would be reconsidered. 6/ Appellant contended at the hearing that his supervisor made the actual final decision to remove him and that while the agency showed that Dr. Renault concurred in the decision to remove him, the agency did not show without Dr. Renault's testimony that he actually considered the case in reaching his decision to concur. The administrative judge during the hearing proceedings, however, determined that Dr. Renault's testimony was unnecessary, and found in the initial decision that his concurrence satisfied the requirement of 5 U.S.C. Sec 4303(b)(1)(D)(ii). See initial decision at 9.

6/ See appeal file, tab 9.

There is no requirement under 5 U.S.C. Sec. 4303 or applicable regulations that the agency official who concurs in or makes the decision to demote or remove an employee for unacceptable performance investigate the truth of the charges before sustaining them. See Beatty, 20 M.S.P.R. at 439. Nor does the Board have the authority to review the deciding or concurring official's selection of the remedy of removal or demotion in a Chapter 43 action. See Lisiecki v. Federal Home Loan Bank Board, 23 M.S.P.R. 633, 644-46 (1984), aff'd, 769 F.2d 1558 (Fed. Cir. 1985), cert. denied, 106 S. Ct. 1514 (1986). The deciding official and the concurring official (in cases where they are not the same agency official) need only show under 5 U.S.C. Sec. 4303(b)(1)(D)(ii) and 5 C.F.R. Sec.

432.101(b) that they exercised independent judgment on the merits in evaluating the Chapter 43 removal or demotion action and deciding or concurring in the proposed action. See Andersen, 27 M.S.P.R. at 350-51. Such verification is particularly important to assure that an employee's procedural protections in a demotion or removal action under Chapter 43 are afforded by an objective judgment of the action by an employee in a higher position than that of the proposing employee. The administrative judge's failure in this case to permit appellant to examine the concurring official in order to verify that he exercised his own considered judgment on the merits of the action is procedural error affecting appellant's substantive rights and requires a remand

for testimony from the concurring official in this regard. See Karapinka v. Department of Energy, 6 M.S.P.R. 124, 127 (1981).

Mr. Wartofsky

Appellant, further, sought to introduce the testimony of Mr. Wartofsky, who was his supervisor immediately before Ms. Singer. The administrative judge disapproved Mr. Wartofsky's testimony in the pre-hearing order on requested witnesses, and again at the hearing when the request for his testimony in the pre-hearing order on requested witnesses, and again at the hearing when the request for his testimony was renewed, on the ground that he had not been shown to have recently worked with appellant and on the ground that appellant's own testimony could establish his prior work

background. Appellant's counsel contended at the hearing that the function and mission of appellant's unit and his duties had not changed in the years since Mr. Wartofsky had supervised appellant. He also claimed that Mr. Wartofsky could provide relevant testimony concerning, inter alia, the application of the performance standard at issue and appellant's performance under the standard.

The Board finds that the person who served as appellant's supervisor immediately before appellant's last supervisor did so should have been permitted to testify as an expert that, in his opinion, the incidents of appellant's performance under the performance standard that formed the basis for the removal action did not

constitute unacceptable performance. See Harms v. Department of Justice, 30 M.S.P.R. 165, 166-67 (1986). Such testimony was not merely duplicative of appellant's subjective assertions that he was performing acceptably inasmuch as this witness was proffered as an objective expert. See 30 M.S.P.R. at 167.

Remaining witnesses

The Board finds that appellant has not offered sufficient evidence in the record to show that the administrative judge abused his wide discretion under 5 C.F.R. Sec. 1201.41(b)(9) by excluding the testimony of the remaining witnesses he proffered. Appellant has not shown that the witnesses would offer relevant, material, and nonrepetitious evidence. See e.g., Benton, 25 M.S.P.R. at 436-37.

ORDER

For the foregoing reasons, the initial decision is VACATED in its determination that appellant's performance was shown to be unacceptable and the appeal is REMANDED for further testimony on this issue from Dr. Renault and Mr. Wartofsky as discussed above.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

VINCENT W. FRANCO,
Appellant,

V.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES.
Agency.

DECIDED JULY 16, 1987

Before: JENKINS, Administrative Judge

BACKGROUND

Appellant was a Technical Publications Writer, GS-1083-11, in the agency's Office of Health Research Reports (OHRR), National Institute of Arthritis, Diabetes, and Digestive and Kidney Disease (NIADDK), National Institutes of Health (NIH). Effective November 22, 1985, he was removed from his position for unacceptable performance under the

procedures of 5 U.S.C. Chapter 43. On appeal to the Board, the agency's removal action was affirmed in an April 15, 1986, initial decision. Appellant subsequently filed a petition for review of that decision.

On March 12, 1987, the Board issued an Opinion and Order vacating the initial decision in its determination that appellant's performance was shown to be unacceptable and remanding the case for further testimony from two witness who had not been permitted to testify at the prior hearing. Ranco v. Department of Health and Human Services, 32 M.S.P.R. 653 (1987). The Board held that the testimony of Dr. Pierre F. Renault was relevant in determining whether he exercised his independent judgment on the merits in serving as the concurring

official under 5 U.S.C. Sec. 4303(b)(1)(D)(ii). The Board also found that Victor Wartofsky, appellant's previous supervisor, should have been permitted to testify as an expert that, in his opinion, the incidents of appellant's performance relied on by the agency did not constitute unacceptable performance. The testimony of Dr. Renault and Mr. Wartofsky was received at the hearing held on April 30, 1987.

For the following reasons the agency's removal action is AFFIRMED.

ANALYSIS AND FINDINGS

Concurrence of Dr. Renault

The signature of Dr. Renault appears next to the word "Concurrence" on the November 18, 1985, decision notifying appellant of his removal. (Ag. File, Tab 45). It is

likewise undisputed that Dr. Renault, at the time the Acting Director of NIADDK, occupied a higher position than the proposing and deciding official, Elizabeth H. Singer, Director of OHRR. For the following reasons I find that the record also establishes that Dr. Renault exercised his own considered judgment on the merits in reaching the decision to concur. Franco, 32 M.S.P.R. at 659.

On direct examination Dr. Renault testified that in reaching his decision to concur in the determination to remove appellant, he reviewed the notice of proposed removal, the final decision, and drafts of appellant's work. He was not certain, however, that he read all of the drafts for the seven summaries prepared by appellant during the improvement period. To assure himself that the action

was procedurally correct he also spoke with someone from the personnel office. Dr. Renault expalined that he wanted to be certain that proper procedures were followed, that what was being asked of appellant was reasonable and attainable, and that appellant was provided assistance during the improvement period. On cross examination Dr. Renault again stated that he felt it was necessary to review appellant's work and repeated that he had read some of appellant's drafts and Ms. Singer's comments. He specifically recalled the fifth summary prepared by appellant because he had reviewed the third draft of that summary in August 1985, before the removal action had been initiated; and had signed a clearance for authorizing its publication in the NIH Record. (Ag. File, Tab 28;

App. Rem. Ex. 3). It was also his testimony that he believed he reviewed appellant's earlier drafts of this summary. (Ag. File, Tabs 22 and 23). Appellant alleges that Dr. Renault did not exercise the independent judgment required by 5 U.S.C. Sec. 4303(b)(1)(D)(ii) because he did not seek the opinion of others on the quality of his work, because he was not independently aware whether he (appellant) had been given assistance during the improvement period, and because he was not sure that he reviewed all of the work products and underlying scientific articles on which the removal action was based. The contention of appellant that Dr. Renault therefore relied solely on the word of Ms. Singer is not, however, supported by the record. First, as noted by the Board

in its remand decision, Franco, 32 M.S.P.R. at 659, Dr. Renault was not required to investigate the truth of the charges before sustaining them. He consequently was under no obligation to seek the opinion of others on appellant's performance or to conduct a separate inquiry into the adequacy of the assistance provided appellant during the opportunity period. Furthermore, his testimony is clear that he objectively considered the evidence presented to him and that he did far more than simply place his signature on the final decision.

Dr. Renault's convincing testimony that he felt it was his responsibility to review appellant's work to assure himself of the validity of the charges and that he did in fact review "some" of that work

points directly to the occurrence of the required independent and objective consideration of the merits. Neither the inability of Dr. Renault to recall with specificity the work that he reviewed nor the possibility that he may not have reviewed all of the work produced by appellant during the improvement period significantly detracts from this conclusion. His review of at least some of appellant's work products, his consideration of the detailed proposal and decision notices, and his inquiries of the personnel office establish that his concurrence was the result of his own independent deliberative consideration of the case, and not a pro forma adoption of Ms. Singer's charges and conclusions. The agency, I find, did satisfy the requirements of 5 U.S.C. Sec. 4303(b)(1)

(D)(ii).

Appellant also contends that to satisfy constitutional due process requirements, more than minimal decisional independence was required of Dr. Renault. This additional requirment exists, appellant alleges, because of the bias of Ms. Singer, the proposing and deciding official. In its remand decision, the Board, however, did not disturb my earlier finding that bias by Ms. Singer was not shown to have been a factor in the removal action. Franco, 32 M.S.P.R. at 658. The Board also declined to consider the constitutional argument of appellant because it was raised for the first time on petition for review. Franco, 32 M.S.P.R. at 657 n.3. Appellant's constitutional claim is therefore not at issue in this

proceeding.

Performance During the Opportunity Period

Critical element one of appellant's performance plan required him to:

> Prepare summaries of research articles published in the biomedical literature about the results of NIADDK-supported research for the purpose of translating technical information into lay-level language.

Performance under this element was considered to be at the "Partially Met" level if appellant "at times submits summaries that are unclear, poorly organized, or that use of technical language unsuitable to meet the needs of a lay audience." (Ag. File, Tab 11). Appellant's performance during the opportunity period was determined to be unacceptable because it fell below the "Partially Met" standard. Ms. Singer found all seven of the summaries

submitted by appellant to be of unacceptable quality because they contained highly technical language, were unclear and poorly organized, in some instances extended the conclusion of the author beyond what was stated in the article or interpreted the results of the journal article incorrectly, and were unsuitable for the intended audience.

Mr. Wartofsky, appellant's supervisor between 1967 and 1979, reviewed the same seven summaries and testified that in his opinion they were of acceptable quality. Generally, he found that the summaries were clearly written and that many of Ms. Singer's editorial changes were unnecessary. Notwithstanding these favorable observation, I find that Mr. Wartofsky's opinion is not entitled to great weight.

His testimony and other evidence in the recod show that the standards against which he was measuring appellant's performance were substantially different from the written standards that appellant had to meet in 1985.

First, as noted above, Mr. Wartofsky last supervised appellant in February 1979, at which time he was reassigned to another office. While he believed that the work of appellant remained the same, he did not stay in contact with appellant or with appellant's office. He thus was not aware that appellant's position description (Ag. File, Tab 4) had been rewritten in 1984, and he acknowledged that he had stopped supervising appellant prior to the development of elements and standards under the agency's Chapter 43 performance appraisal system. (App. Rem.

Exh. 2). He also testified that he had not seen the specific instructions that Ms. Singer had provided to appellant at the beginning of the opportunity period. (Ag. File, Tab 12). There was likewise no showing that Mr. Wartofsky was aware of the communications from Ms. Singer in April, June, and Ocotber 1984 that informed appellant that his summaries were too technical and unsuitable for a lay audience. (Ag. File, Tab 5-7).

The record therefore establishes that Mr. Wartofsky had no knowledge of the numerous oral and written instructions from Ms. Singer that provided meaning and content to appellant's standards under critical element one and specifically to the term "lay audience". 1/ Baker v. Defense Logistics Agency, 25 M.S.P.R. 614 (1985),

aff'd, 782 F.2d 1579 (Fed. Cir. 1986). The testimony of Mr. Wartofsky also independently demonstrates that the nature of the summaries prepared by appellant and the audience for who he was writing were substantially different in 1979. At that time the weekly summaries

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1/ In the first hearing Ms. Singer testified that the audience for appellant's summaries included NIH employees, patients and their families, the public, and other science writers. She also explained that the "lay audience" would have a tenth to twelth grade reading level. In the remand hearing, Dr. Renault likewise testified that the summaries were to describe scientific advances in lay terms.

of research findings that appellant was preparing were intended for the front office, the non-technical employees of the agency, and the technical employees of NIH. These summaries, Mr. Wartofsky explained, were not for the general public. Press releases were used if it was necessary to provide information to the general pubic or a lay audience. However, because appellant, in Mr. Wartofsky's estimation, was more technically oriented, he was not asked to prepare the press releases.

The testimony of Mr. Wartofsky with respect to the specific deficiencies noted by Ms. Singer on the seven summaries prepared during the opportunity period, further illustrates the difference between appellant's standards in 1979 and 1985. In the first summary he

acknowledged that the expression "disordered physiology" might be changed for the general public. (Ag. File, Tab 13). In the second and third summaries he also testified that validity of some of the changes made by Ms. Singer would "depend on the public" and that a lay audience "might have trouble" with some of the material. (Ag. File, Tabs 15, 17, and 20). His opinion that the fifth summary was acceptable was also qualified by his testimony that it would depend on the audience, that it was all right for NIH, but that the general public "would have stumbled" over some of the words used by appellant. (Ag. File, Tab 22).

For all of the above reasons I find that Mr. Wartofsky's expert opinion of the quality of appellant's work is not based on appellant's 1985 performance

standards and that it therefore does not establish that appellant's performance on the seven summaries at issue was at or above the "Partially Met" level. As his testimony therefore provides no basis for a reconsideration of the evidence already in the record, I hereby adopt the findings in my April 15, 1986, initial decision. Hanratty v. Department of Transportation, 8129 F.2d 286 (Fed. Cir. 1987). The agency, I conclude, has established by substantial evidence that appellant failed to meet the performance standard for critical element one and that his performance was therefore "unacceptable." 5 U.S.C. Sec. 4301(3).

REVIEW RIGHTS

This is an initial decision and will become a final decision of the Merit

Systems Protection Board on August 20, 1987, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. Sec.s 1201.113 and .117. Any party to this appeal, the Director of the Office of Personnel Management or the Special Counsel may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with the Board's regulations. 5 C.F.R. Sec.s 1201.114. The parties should note that they are required to serve any petition for review and any subsequent pleadings on all other parties. 5 C.F.R. Sec 1201.114(h). It is not necessary to serve the Regional

Office. The petition for review must be filed on or before August 20, 1987 and must set forth objections to the initial decision, supported by reference to applicable laws and regulations, and the record.

Any appellant adversely affected or aggrieved by a final decision of the Board may file a petition with the United States Court of Appeals for the Federal Circuit, if the Court has jurisdiction. 5 U.S.C. Sec. 7703. A petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be <u>received</u> by the Court within thirty (30) days after the Board's decision becomes final. Petitions must be sent to:

U.S. Court of Appeals
for the Federal Circuit

717 Madison Place, N.W.
Washington, D.C. 20439

For the Board:

William C. Jenkins
Administrative Judge

(2)

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-768

In the Supreme Court of the United States

OCTOBER TERM, 1988

VINCENT FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-768

VINCENT FRANCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his due process rights were violated because his immediate supervisor acted as both the proposing and deciding official in removing petitioner from federal employment pursuant to 5 U.S.C. 4303.

1. Petitioner was a Technical Publications Writer, GS-11, in the Office of Health Research Reports (OHRR) of the National Institute of Arthritis, Diabetes, and Digestive and Kidney Diseases (NIADDKD). Pet. App. 1-2. On April 1, 1985, petitioner's supervisor, the Director of OHRR, gave petitioner a rating of "unacceptable" for his performance during the 1984 calendar year because he had failed to meet Critical Element 1 of his performance plan.[1] On April 17, 1985, petitioner's supervisor advised

[1] This element required petitioner to (Pet. App. 13):

> Prepare summaries of research articles published in the biomedical literature about the results of NIADDK-supported research for the purpose of translating technical information into lay-level language.

petitioner in writing that he was being given 90 days—later extended an additional 30 days—to improve his performance and that failure to bring his performance up to an acceptable level could result in his termination from federal employment or a reduction in grade. At the end of the improvement period, petitioner's supervisor concluded that petitioner's work during the period was still unacceptable. Accordingly, on October 4, 1985, she proposed to remove petitioner pursuant to 5 U.S.C. 4303. On November 18, 1985, she issued a final decision for the agency in which she concluded that removal was warranted. Pet. App. 12-14. The removal decision was concurred in by the Acting Director of NIADDKD. Pet. App. 46-47, 60.

2. a. Petitioner appealed the agency's decision to a regional office of the Merit Systems Protection Board (MSPB). An administrative law judge (ALJ) upheld the removal, concluding that the performance standards in Critical Element 1 were not too vague; that petitioner had an adequate period of time in which to improve his performance; that substantial evidence supported the agency's action; that petitioner failed to demonstrate that any procedural error had been committed; and that petitioner had failed to demonstrate that any alleged bias or personal dislike by his supervisor had a bearing on the removal decision. Pet. App. 11-37.

b. Petitioner filed a petition for review with the MSPB, which was granted. Pet. App. 38-39. The MSPB agreed with the ALJ's conclusion that the procedures followed by the agency were proper. Specifically, the MSPB found that the agency's designation of petitioner's supervisor as both the proposing and deciding official with respect to his removal did not violate 5 U.S.C. 4303.[2] The

[2] The MSPB declined to consider petitioner's additional claim that this procedure violated his right to due process, noting (Pet. App. 44

MSPB also declined to overturn the ALJ's finding that alleged bias by petitioner's supervisor had no bearing on the removal decision. Pet. App. 46-48. The Board nonetheless vacated the ALJ's determination that petitioner's performance had been shown to be unacceptable and remanded for further testimony on this issue. Specifically, the Board found that the ALJ erred in precluding petitioner from offering testimony by the Acting Director of NIADDKD, who concurred in the removal, and by petitioner's prior supervisor. Pet. App. 49-55.

c. Following an additional hearing, at which both the concurring official and petitioner's prior supervisor testified, the ALJ again affirmed the agency's action. He concluded that the Acting Director of NIADDKD, as required by 5 U.S.C. 4303(b)(1)(D)(ii), had "exercised his own considered judgment on the merits in reaching the decision to concur" in petitioner's removal (Pet. App. 60). He also concluded (*id.* at 73) that "the agency * * * has established by substantial evidence that [petitioner] failed to meet the performance standard for critical element one and that his performance was therefore 'unacceptable' " within the meaning of 5 U.S.C. 4301(3). This decision became the final decision of the MSPB, after the Board declined to review it.

3. The Federal Circuit affirmed (Pet. App. 1-10), holding that the Board's decision was supported by substantial evidence. The court also concluded that the agency followed the removal procedures set forth in 5 U.S.C. 4303 and that "the statute does not prohibit the same person from serving as proposing and deciding official, even where that person also has a role in the super-

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n.3) that this argument had been raised for the first time in the petition for review.

visory hierarchy." Pet. App. 2-3 (citing *Hanley* v. *GSA*, 829 F.2d 23, 25 (Fed. Cir. 1987); *DeSarno* v. *Department of Commerce*, 761 F.2d 657, 660 (Fed. Cir. 1985)). The court noted that 5 U.S.C. 4303(b)(1)(D)(ii) requires that a person in higher supervisory status exercise considered judgment in concurring in the removal and concluded that petitioner had failed to demonstrate that the concurring offical had not exercised the required judgment in this case. Finally, the court held that "the statute is not flawed in terms of due process of law." Pet. App. 3.

Judge Baldwin dissented. He acknowledged that prior Federal Circuit cases established that the proposing and deciding official in a performance-based removal action could be the same person. He proposed an exception to that rule, however, where "that person is also the employee's immediate supervisor who is charged with the daily evaluation of the employee" (Pet. App. 10). Judge Baldwin considered it "unreasonable to expect that anything that petitioner could say to his supervisor during an informal hearing could cause her to change her mind about these evaluations" (*id.* at 9-10). Thus, he concluded that "the peculiar circumstances of this performance-based removal action violat[ed] petitioner's due process rights" (*id.* at 10).

4. Petitioner does not challenge the substantiality of the evidence that his performance was unacceptable. Nor does petitioner dispute that the agency fully complied with 5 U.S.C. 4303 in removing him from his position. Petitioner contends only that his due process rights were violated because his immediate supervisor both proposed his removal and acted as the decisionmaker. The court of appeals rightly rejected this contention, and its decision on this issue does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

In *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985), this Court held that before an individual may be removed from public employment, he must receive a pre-termination hearing. That hearing, however, "need not definitively resolve the propriety of the discharge" (*id.* at 545). Rather, it need only determine whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed adverse action (*id.* at 545-546). Thus, a career federal employee, such as petitioner, is entitled only to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story (*id.* at 546). Petitioner concedes (Pet. 8-9) that he was notified of his proposed termination and that he had an opportunity – which he used – to respond orally and in writing to his proposed termination. "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee" (470 U.S. at 546).

Due process does not require that the decision to remove a federal employee come from someone other than the employee's immediate supervisor who proposed the removal in the first place. Indeed, the employee's immediate supervisor is plainly in the best position to evaluate the quality of the employee's work. And there is no reason to believe that supervisors are inherently incapable of dispassionately considering explanations offered by employees for allegedly inadequate performance. Furthermore, a higher official in the agency must exercise considered judgment in concurring in the removal (see Pet. App. 3). This concurrence serves as an independent check upon the judgment of the immediate supervisor, as of course does post-termination review by the MSPB.

Although petitioner asserted that his supervisor's decision to remove him was based on bias and personal dislike,

the ALJ expressly rejected that contention. Pet. App. 34.[3] The MSPB found no basis for disturbing this finding, and the court of appeals concluded that the Board's decision was supported by substantial evidence. In any event, such allegations of bias are not sufficient to require that a wholly neutral decisionmaker be appointed to conduct a pre-removal hearing.

In *Arnett* v. *Kennedy,* 416 U.S. 134, 137 (1974), an employee was removed from his job as a field representative in the Chicago Regional Office of the Office of Economic Opportunity (OEO) for, inter alia, falsely stating that the Regional Director of the OEO and his administrative assistant had attempted to bribe a representative of a community action program that dealt with OEO. The employee argued that he had a right to a trial-type hearing before an impartial hearing officer before he could be removed. Although the Court did not issue a majority opinion, "six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits." *Loudermill,* 470 U.S. at 542. More significantly, for present purposes, a majority of the Justices in *Arnett* found no constitutional infirmity in allowing the Regional Director—the person accused of making the attempted bribe—to conduct the pre-removal hearing, despite the fact that "a charge that an employee had defamed a supervisor may

[3] The ALJ pointed out that the record in fact "demonstrates considerable patience and tolerance by" petitioner's supervisor. She had been concerned about the quality of petitioner's work for nearly two years before she proposed to remove him; petitioner was given 120 days in which to improve; and many efforts were made to assist petitioner in improving his performance (Pet. App. 34).

generate a maximum of personal involvement on the part of the latter." *Arnett,* 416 U.S. at 156 n.21.[4]

Surely, if a defamed supervisor may preside at the pre-removal hearing of the person who allegedly defamed him, then a supervisor may conduct a pre-removal hearing for her subordinate whose work she finds unacceptable. Petitioner in this case had the pre-removal hearing contemplated by this Court in *Loudermill.* Moreover, as the more than 60 pages of MSPB opinions demonstrate, petitioner also had extensive post-termination hearings by neutral decisionmakers in which his claims were fully considered. "A fundamental requirement of due process is 'the opportunity to be heard' at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). Petitioner has been afforded all the process that is due.

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[4] Justice Powell in his opinion recognized the significant practical problems that would be created by a requirement that an "impartial decisionmaker" conduct the pre-removal hearing (*Arnett,* 470 U.S. at 170-171 n.5):

> In most cases, the employee's supervisor is the official best informed about the "cause" for termination. If disqualification is required on the ground that the responsible supervisor could not be wholly impartial, the removal procedure would become increasingly complex. In effect, a "mini-trial" would be necessary to educate the impartial decisionmaker as to the basis for termination.

Petitioner's reliance on such cases as *Goldberg* v. *Kelly,* 397 U.S. 254, 271 (1970) (termination of welfare benefits) and *Withrow* v. *Larkin,* 421 U.S. 35 (1975) (state board's investigation of practices of medical doctors), for the proposition that the pre-removal decisionmaker must be impartial, is misplaced. Neither of those cases involved termination of public employment. As this Court has repeatedly recognized, the procedures required to satisfy due process vary with the nature of the interest at stake and the circumstances. *Brock* v. *Roadway Express, Inc.,* 481 U.S. 252, 262 (1987); *Boddie* v. *Connecticut,* 401 U.S. 371, 378 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

VINCENT FRANCO,

Petitioner,

v.

DEPT. OF HEALTH & HUMAN SERVICES,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO RESPONDENT'S OPPOSITION TO CERTIORARI

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Although "sufficiency of the evidence" is not a challenge presented here by Petitioner, evidentiary failures by the Agency are still now asserted.

For example, as part of his challenge to the ability of the Agency to render a constitutional termination decision, Mr. Franco has explicitly asserted that the government has failed to supply any evidence to rebut Petitioner's claims of bias. The issue of bias is always central to the ability of a decision-maker to render a constitutionally valid decision, Goldberg v. Kelly, 397 U.S. 254 (1970) Withrow v. Larkin, 421 U.S. 35 (1975).1/ In the case sub

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1/ The Solicitor's attempt to distinguish Goldberg and Withrow because neither involved the process due a federal employee upon termination, does not apply to the requirement stated in both, that decision-makers are to be non-biased when determining due process rights.

judice, it is the very strong likelihood of bias that Judge Baldwin, in his dissent, found had tainted the multiple decision-making roles held by Ms. Singer, Petitioner's supervisor. He held that she stood too close to the fray to view it objectively. Further, it must be noted that the unrefuted evidence of bias by Ms. Singer against Petitioner Franco was found below to be irrelevant, not non-existent. (Pet. App. 33-34). Therefore, it may be inferred that the issue of bias still is a factor here due to an evidentiary failure by the Agency.

Petitioner Franco argues that the unchallenged existence of bias tainting the termination is a fatal flaw to the constitutional propriety of the procedural used. In Withrow and in Goldberg, the determinations made by decision-makers resolving questions of right to property protected by the Constitution were invalidated. In the first case the Court

determined that even the appearance of bias was deemed enough to taint and thus, invalidate the decision. In the second situation, a decision-maker with prior involvement was deemed inappropriate.

The Solicitor's claim that Arnett v. Kennedy, 416 U.S. 134 (1974) is analogous to the facts here is misplaced. First, in Arnett the allegations against the decision-maker involved acts he is alleged to have performed - but no one could state with certainty that he had performed those acts. To allow a federal employee faced with removal to eliminate officials by verbalizing defamatory remarks about them to engender bias would encourage slander. Here, the acts of the Proposing and Deciding Official were performed without question - Ms. Singer did decide that the performance of Petitioner was unacceptable three separate times. Arnett is clearly distinguishable.

Another important distinction from Arnett must be noted. The actions of the employee incurring the bias of the Deciding Official were not the subject of the termination proceeding. Here, of course, the reasons for suspecting bias are the decisions upon which termination was to be decided.

Finally, if the issue of bias previously discussed was left unresolved by the MSPB, the issue of prejudice is not. Ms. Singer made a forejudgment of Petitioner's work performance long before she raised the hat of Deciding Official to her head. The mental attitude and disposition of the Deciding Official was formulated against Petitioner Franco by her prior determinations of the facts in either of her previous roles. We are not faced here with prior exposure, but with prior decision-making on the same facts. Goldberg, supra.

The effect of that prior decision-making role by Ms. Singer was to deprive Petitioner of his opportunity to be heard. This has not

been addressed by the lower court's majority opinion or the Solicitor's Opposition. It cannot be denied that if the opportunity to be heard did not occur until after the decision has been rendered, Petitioner would have been denied his rights. We here assert that the result for Petitioner is the same and that his hearing was no opportunity at all. As quoted by the Solicitor's Opposition at page 7, "A fundamental requirement of due process is 'the opportunity to be heard' at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Petitioner prays this Court to accept his Writ of Certiorari.

Respectfully submitted,

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Gary T. Brown